



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***Fedgroup Participation Bond Managers v Trustee of the Capital Property Trust [2015]
ZASCA 103 (30 June 2015)***

MEDIA STATEMENT

Today, the Supreme Court of Appeal (SCA) delivered a judgment (i) dismissing an application by Fedgroup Participation Bond Managers (Pty) Ltd (Fedgroup) for leave to amend its notice of motion; (ii) dismissing the appeal by Fedgroup; and (iii) dismissing a cross-appeal by the trustee of the Capital Property Trust Collective Investment Scheme in Property (CPT). Consequently, the court upheld the order of the Gauteng Local Division, Johannesburg, and refused to grant Fedgroup's application for transfer of certain land belonging to CPT.

The appeal before the SCA concerned the issue of whether someone encroaching on another's land is entitled, in the absence of an action or an application being brought by the owner of the land for a demolition order, to approach a court for an order compelling the owner to transfer, not only that part of the land on which there is encroachment, but also to seek transfer of additional vacant land against a tender of compensation. The cross-appeal of CPT concerned the question of whether, if an encroacher has such a right, it had prescribed in this instance.

The facts of the matter are as follows. Originally, Fedgroup owned two adjacent pieces of prime commercial land in Sunninghill, Gauteng. In 2006, Fedgroup sold one of these pieces of land to CPT. In 2008, it was discovered that a substantial but incomplete structure on Fedgroup's land encroached upon what was now CPT's land. Negotiations aimed at an amicable resolution were unsuccessful, and Fedgroup launched an application for transfer of (i) the land encroached upon by the incomplete structure, as well as (ii) further vacant land which, Fedgroup alleged, was necessary for the optimal

development of its property. The total extent of the land claimed by Fedgroup constituted 20% of CPT's property.

In its founding papers, Fedgroup was emphatic that its prayers for transfer of land were *not* in the alternative, and that its case was squarely based on transfer of both pieces of land. However, before the SCA, it sought leave to amend its notice of motion to include an alternative prayer for transfer of only the encroached upon land. The SCA held that this represented a radical shift in its case, to CPT's prejudice, and that this could not be countenanced. Accordingly, the application for leave to amend Fedgroup's notice of motion was dismissed.

With regard to the main appeal, the SCA held that Fedgroup's appeal (and, therefore, its application) must fail for four reasons. First, after reviewing the old authorities and South African case law and academic opinion on the powers of a court in encroachment matters, the SCA held that while a court may have a discretion to refuse an application for removal of an encroaching building in certain circumstances, this discretion is only activated where there is in fact an application by the owner for demolition or removal. An encroacher does not have an independent cause of action to compel the owner to part with his rights of ownership. In this regard, the SCA expressly rejected the conclusion to the contrary reached by the court a quo. Second, Fedgroup had sought transfer of not only the encroached upon land, but also additional vacant land. Such an order, it was held, is just not competent. Third, there were several material disputes in relation to the properties and their values, and on CPT's valuations, the compensation tendered by Fedgroup would be inadequate and CPT would suffer the greater and irreparable prejudice. Fourth, the encroaching structure which Fedgroup sought to have remain in place was erected unlawfully. The SCA reiterated that a court will not countenance or be party to perpetuating unlawful conduct.

With regard to the cross-appeal, the SCA held that the dismissal of the appeal rendered the cross-appeal moot and so it also fell to be dismissed, without a full determination of the question in issue being necessary. Nonetheless, the SCA did in passing criticise the approach and reasoning of the court a quo on this topic.

Accordingly, the SCA dismissed (i) Fedgroup's application to amend its notice of motion; (ii) the appeal; and (iii) the cross-appeal.

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